No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees.

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants,

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

PETITION FOR REHEARING

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TOPICAL INDEX

TABLE OF CASES

AND

AUTHORITIES CITED

CASES

AUTHORITIES

STATUTES

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STATEMENT OF GROUNDS FOR REHEARING

I.

The Court of Appeals erred in ruling that Appellee Swift & Company had no right to recover damages upon the theory that Appellee had rescinded its contract with Arizona York Refrigeration Company by permitting the replacement of only a portion of the equipment which was covered by their contract, since the contract was an indivisible contract and a partial rescission cannot be had except upon mutual agreement of the parties to such contract, and there was no such agreement between them.

II.

The Court of Appeals erred in holding that:

> "Under the Arizona statute . . . that rescission follows as a matter of law the return of property and the return operates as a conclusive presumption of law that the buyer intended to rescind.",

because under Arizona law rescission is a question of fact and not a question of law.

III.

The Court of Appeals erroneously concluded that there was no contention by plaintiff that there was no understanding or conversation concerning rescission or the reservation of rights of plaintiff to recover for its damaged products, for the Transcript of Record shows that there was a definite conversation concerning such matters.

IV.

The Court of Appeals erred in adopting the decision of an Arizona Superior Court trial judge made in the case of *Charles Roberts v. J. C. Penney Company* as being the rule of decision in the State of Arizona, since both this Court and the Supreme Court of the United States have held that such a decision does not control decisions of Federal Courts.

ARGUMENT

If the rule announced by the Court in this case is permitted to stand, one who purchases a new automobile with the customary warranties, by merely permitting his seller to replace a defective windshield wiper would rescind the contract of sale, and irrespective of what other defects might thereafter be discovered the buyer would have no further rights against his seller.

If this is the rule, then under the holding in this case, if another defect develops in other portions of the machinery covered in its contract with Appellant Arizona York Refrigeration Company, Appellee Swift & Company would have no rights to any redress, because of such defect, although it was unknown to Swift & Company at the time the coils were replaced. This for the reason that under Arizona law:

> "To rescind a contract is not merely to terminate it, but to abrogate it and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had been made."
>
> *Reed v. McLaws et ux,* (1941), 56 Ariz. 556, 110 P. 2d 222.

The general rule is that it is essential to the rescission of a sale for breach of warranty that *all* the goods must be returned; the buyer may not return a part and retain the balance. *McClaran v. Longdin-Brugger Co.,* (1926), 240 Ohio App. 434, 157 N.E. 828.

The exception to the general rule is where the con-

tract is severable, then in such instance there may be a rescission in part. *Clifford v. Stewart,* (1922), 153 Minn. 382, 190 N.W. 613.

Here the contract was not severable and the rule is clear that neither a seller nor a buyer is permitted to affirm a contract in part and rescind as to the residue. The United States Court of Appeals of the Seventh Circuit, in *Reno Sales Co., Inc. v. Pritchard Industries Inc.,* (1949), 7th Cir., 178 F. 2d 279, stated the rule as follows:

> "Defendant admits that it is a well settled rule of law that a purchaser is not permitted to affirm a contract in part and rescind as to the residue. . ."

The rule is likewise stated in 77 CJS 798, Section 101, Sales, as follows:

> "Generally speaking, a contract of sale may be rescinded only in toto; it cannot be affirmed in part and disaffirmed, repudiated, or rescinded in part by either the seller or the buyer."

In this case the evidence was clear that by its contract with Appellant Arizona York Refrigeration Company, Appellee Swift & Company was to acquire a complete refrigeration system for the specific purpose of refrigerating its new storage plant in Tucson, Arizona. It was not simply a contract for the Appellant Arizona York Refrigeration Company to furnish a set of Bush coils. It was not a contract to furnish any particular item for use in a refrigerating system, but clearly was a contract for the furnishing of all materials and labor for a complete refrigerating system. As such it was a contract that was not sever-

able. It not being severable there can be no rescission less than a complete rescission. The evidence in this case is clear that at most there was only a claimed partial rescission. Such is not permitted under the law.

We respectfully submit that under the laws of Arizona the actions of the buyer, Appellee Swift & Company, in permitting a replacement of that portion of the machinery which was defective did not constitute a rescission.

The case of *Charles Roberts v. J. C. Penney Company,* Superior Court of Maricopa County, Arizona, No. 76505 (1954), was not appealed and merely represented the opinion of one of the many trial judges in Arizona; an opinion which counsel asserts is not binding on this Court, and should not be adopted by this Court as expressing the law of Arizona. It is not even binding upon the other Superior Courts in Arizona.

It is impossible for Appellee Swift & Company to believe that if the facts in the instant case had been presented to Judge Stevens, rather than the facts before him in the *Roberts* case, he would have reached the same conclusion.

Consider again the distinguishing facts in the two cases. In the *Roberts* case the plaintiff purchased a pair of shoes which he claimed were defective and injured him. He accepted from the seller a new pair of shoes, and, based on this acceptance, the trial judge of the court of first instance held that the contract had been rescinded. Certainly, this is distinguishable from the facts in the instant case.

In this case, Appellee Swift & Company had paid to seller thousands of dollars for labor and machinery installed in its plant. One portion of this machinery

proved defective, resulting in the escape of large quantities of ammonia gas and the loss of products being refrigerated in excess of $9,000. The seller, or its successor, then replaced that small part of the machinery which was defective so that the plant could again be placed in operation. Had Appellee Swift & Company refused to permit the repair of the machinery until such time as it had been reimbursed for all of its damages, the damages for the loss of its products, the loss of profits during the time the plant was inoperative, and the other damages that would have been incurred would have increased Swift & Company's loss by many thousands of dollars.

Would this court, if such had been the case, hold that Swift & Company was justified in refusing to permit the machinery to be repaired until it had been fully compensated for all its loss, including the cost of replacing the defective coils?

If the Court's holding in this case is to stand, that is the rule which this Court will be adopting for the State of Arizona; in short that a Seller who has furnished defective equipment is not entitled to minimize damages by immediately curing the defect, but must be refused an opportunity to minimize damages until such time as the entire loss to his customer has been determined and paid, or until his customer waives all further rights under the contract of sale.

It is Appellee Swift & Company's position that under subsection A 4 of Section 44-269 ARS, reading:

> "Rescind the contract to sell or the sale and refuse to receive the goods or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.",

rescission does not follow as a matter of law.

In the Arizona case of *Reed v. McLaws et ux,* (1941), 56 Ariz. 556, 110 P. 2d 222, defendant purchased land and equipment under contract and after making several payments stopped. When sued by the plaintiff, defendant alleged rescission of the contract. The trial court apparently held the issue of rescission immaterial, and for that reason did not decide it. Upon appeal the Arizona Supreme Court held that "whether or not there was a rescission of the contract is also a *question of fact.*" (Emphasis ours)

We call the Court's attention to the fact that, in order to recover the purchase price under subsection A 4 of Section 44-269 ARS, a buyer must rescind the contract *and* return or offer to return the goods. Because of the conjunction "and" there are two separate prerequisites to the recovery of the purchase price, namely, rescind the contract *and* return the goods.

As authority for the foregoing paragraph, we cite to the Court the case of *Abdallah, Inc. v. Martin,* (1954), 242 Minn. 416, 65 N.W. 2d 641, wherein the court stated, in construing MSA 512.69, paragraph D, identical to subsection A 4 of Section 44-269 ARS:

> "In our opinion, rescission and return of the goods are not one and the same thing. In other words, a return of the goods in itself is not a rescission. Rather, it appears to us that return may be more properly classified as an element of rescission. Rescission, the unmaking or abrogation of a contract, requires intent to do so. It may be conceded that in some cases a rescission might be inferred from the return of the goods, as where a buyer, on discovering a breach of warranty, demands to return *all* he

has acquired under the contract and to receive back what he has paid."

Since rescission requires an intent, and since intent must be determined from the facts, the question of whether a party rescinded a contract is a question of fact and not a question of law. By holding that rescission follows as a matter of law the Court is, in effect, making a new contract for the buyer and the seller.

In the *Abdallah, Inc. v. Martin* case (supra) the Court held that accepting a substitution or replacement of defective merchandise did not in and of itself constitute a rescission of the original contract.

The record in this case shows that with respect to rescission the trial court found, as a fact, that there was no intent on the part of any of the parties to rescind the contract. (TR. 32). It certainly is the rule of this court that it will not disturb the findings of the trial court where there is any evidence to support such findings. There is abundant evidence in the record to support this finding.

The Court, at page 6 of its decision, stated:

"Plaintiff does not contend that in connection with such transactions it reserved a claim for damages resulting from the breach of the contract, or that there was any understanding or conversation whatever concerning rescission or the reservation of any rights."

Obviously, the Court overlooked the portion of the testimony of the witness A. C. Black, which appears as follows on page 104 of the Transcript of Record:

"Q. Was there anything else said, anything about the damage to this product or anything of that nature in your conversation?

A. Well, at the same time during the conversation, as well as I remember, to my best recollection, was that Mr. Robertson made the statement that they would, their insurance company would pay for the damaged product."

The Court will note that this was a part of the same conversation during which the Arizona York Refrigeration Company, through its officer, Mr. Robertson, offered to replace the defective coils free of charge. This certainly is sufficient for the trial court to find that there was a definite understanding by the Appellee Swift & Company that by its permitting the substitution of the defective coils it would not be deprived of its rights to recover for its damaged product.

This testimony standing alone is sufficient to support the Court's finding of fact that there was no intention on the part of any of the parties to the agreement to effect a rescission of the agreement merely by the permitting of the substitution of new coils for the defective ones.

As this Court undoubtedly knows, although Arizona Superior Courts technically are considered courts of record, their decisions are neither published nor digested in any manner whatsoever. Article 6, Chapter 16, Arizona Constitution.

It is entirely probable that there are decisions of our Superior Courts holding exactly contrary to the holding in the *Roberts* case. In order to prove or disprove such fact counsel would have to search each and every case filed in the office of the clerk of the Superior Court in each of the fourteen counties of Arizona, commencing with the date the Uniform Sales Act was adopted which was prior to statehood.

The United States Supreme Court recognized the intolerable burden, both financial and time-wise, that would be imposed upon counsel if the Federal District Courts were to be bound by these unpublished and undigested decisions of the state Superior Courts. In its decision in the case of *Mary Bell King v. Order of United Commercial Travelers of America,* 333 US 153, 68 S. Ct. 488, 92 L. ed. 608, it gave the reasons why these unreported and undigested decisions should not be binding upon the Federal judiciary.

Furthermore, this Court, in the case of *State of California, Department of Employment v. Fred S. Renauld & Co., et al,* (1950), Ninth Circuit, 179 F. 2d 605, held that Federal Courts are not bound to follow trial courts' decisions unless "a goodly number of trial courts of the state generally and for a considerable period of time have adhered to a common interpretation of the point."

In view of the decision in the *King case* and the rule enunciated in the *State of California* case, counsel for Appellee Swift & Company earnestly submit that the Federal District judge in this case should not follow the Maricopa County Superior Court case of *Charles Roberts v. J. C. Penney Company.* Rather, we urge the Court that the Federal District judge in this case, paraphrasing the language used in the *King* case, was justified in holding the decision in the *Roberts* case not controlling, and could proceed to make his own determination of what the Supreme Court of Arizona would probably rule in a similar case as the one before him.

Regarding the Federal District judge's opinion of what the Arizona Supreme Court might rule, we wish to mention that James A. Walsh, the Federal District

Judge in this case, prior to his appointment to the Federal bench, served for several years as a distinguished and competent judge of the Arizona Superior Court, County of Maricopa.

It seems clear that where there has been only one decision of a Superior Court case cited to this Court, the opinion of the United States District judge, being a former Superior Court judge himself of the same county, is entitled to greater weight than that of the judge who has been cited to this Court, particularly where the factual situation is of such great importance and so vastly different.

Counsel for Appellee Swift & Company asserts that the Federal Court in this case is not bound by, nor should it consider, the decision of the Arizona Superior Court in the case of *Charles Roberts v. J. C. Penney Company,* of Maricopa County, Arizona, No. 76505 (1954).

CONCLUSION

For the reasons stated above, Appellee Swift & Company requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed and the judgment of the United States District Court be affirmed.

Respectfully submitted,

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